No. 93-318

Supreme Court, U.S.
FILED
AUG 26 1993
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA, MCI COMMUNICATIONS CORPORATION, NEWSPAPER ASSOCIATION OF AMERICA, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ASSOCIATION OF DIRECTORY PUBLISHERS, COMMERCE CLEARING HOUSE, INC., COX ENTERPRISES, INC., DIALOG INFORMATION SERVICES, INC., GE INFORMATION SERVICES, INFORMATON INDUSTRY ASSOCIATION, INTERNATIONAL COMMUNICATIONS ASSOCIATION, MCGRAW-HILL, INC., MEAD DATA CENTRAL, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL CABLE TELEVISION ASSOCIATION, INC., PRODIGY SERVICES COMPANY, TOWARD UTILITY RATE NORMALIZATION, WEST PUBLISHING COMPANY, THE WISCONSIN CITIZENS' UTILITY BOARD, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA, AMERITECH, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORPORATION, U S WEST, INC., *et al.*,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

JOHN R. WORTHINGTON
Senior Vice President
and General Counsel
MCI COMMUNICATIONS CORP.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-1600

BRUCE J. ENNIS, JR.*
CHESTER T. KAMIN
MICHAEL H. SALSBURY
ANTHONY C. EPSTEIN
DONALD B. VERRILLI
JEROME L. EPSTEIN
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
*Counsel for MCI Communications Corporation*

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

SUE D. BLUMENFELD
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-8000
*Counsel for Association of Directory Publishers*

GEORGE F. PAPPAS
BARBARA L. WAITE
VENABLE, BAETJER, HOWARD & CIVILETTI
Suite 1000
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800
*Counsel for Commerce Clearing House, Inc.*

GENE KIMMELMAN
CONSUMER FEDERATION OF AMERICA
1424 16th Street, N.W.
Suite 604
Washington, D.C. 20036
(202) 387-6121
*Counsel for Consumer Federation of America*

WERNER K. HARTENBERGER
LAURA H. PHILLIPS
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street, N.W.
Washington, D.C. 20037
(202) 857-2500
*Counsel for Cox Enterprises, Inc.*

ROBERT P. REZNICK
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600
*Counsel for Dialog Information Services, Inc.*

BRUCE E. HUNTER
GE INFORMATION SERVICES
401 N. Washington Street
Rockville, MD 20850-1785
(301) 340-5342
*Counsel for GE Information Services*

ROBERT J. BUTLER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 479-7000

ANGELA BURNETT
INFORMATION INDUSTRY ASSOCIATION
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 639-8262
*Counsel for Information Industry Association*

JOSEPH P. MARKOSKI
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600
*Counsel for Information Technology Association of America*

BRIAN R. MOIR
Attorney-at-Law
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 331-9852
*Counsel for International Communications Association*

ANN J. LAFRANCE
DAVID ALAN NALL
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600
*Counsel for McGraw-Hill, Inc.*

MICHAEL A. JACOBS
SARA STRAIGHT WOLF
GERALD E. YUNG
MEAD DATA CENTRAL, INC.
9393 Springboro Pike
P.O. Box 933
Dayton, Ohio 45401
(513) 865-7200
*Counsel for Mead Data Central, Inc.*

HENRY L. BAUMANN
BARRY D. UMANSKY
TERRY L. ETTER
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

*Counsel for National Association of Broadcasters*

H. BARTOW FARR III
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

DANIEL L. BRENNER
MICHAEL S. SCHOOLER
NATIONAL CABLE TELEVISION ASSOCIATION
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

*Counsel for National Cable Television Association, Inc.*

RICHARD E. WILEY
MICHAEL YOURSHAW
WILLIAM BAKER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

JOHN F. STURM
Senior Vice President
Government, Legal and Public Policy
NEWSPAPER ASSOCIATION OF AMERICA
529 14th Street, N.W.
Suite 440
Washington, D.C. 20045-1402
(202) 783-4697

*Counsel for Newspaper Association of America*

ROBERT J. BUTLER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

*Counsel for Prodigy Services Company*

VANCE K. OPPERMAN
OPPERMAN HEINS & PAQUIN
1301 K Street, N.W.
East Tower, Suite 650
Washington, D.C. 20005
(202) 789-3970

JONATHAN W. CUNEO
LAW OFFICES OF JONATHAN W. CUNEO
1301 K Street, N.W.
East Tower, Suite 650
Washington, D.C. 20005
(202) 789-3960

*Counsel for West Publishing Company*

KATHLEEN F. O'REILLY
510 E Street, S.E.
Washington, D.C. 20003
(202) 543-5068

*Counsel for Wisconsin Citizens' Utility Board, Inc.*
and
*Toward Utility Rate Normalization*

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether a district court must enter an antitrust consent decree order that it finds to be anticompetitive and contrary to the public interest, solely because the Justice Department has reasonable grounds for supporting the order.

2. Whether the D.C. Circuit's refusal to review a proposed decree modification under the explicit standard drafted by the district court and used consistently by the parties is inconsistent with a prior decision of this Court, with decisions in other circuits, and with sound administration of consent decrees.

## RULE 14.1(b) AND RULE 29.1 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the Court of Appeals whose judgment is sought to be reviewed, is as follows:

United States of America
Ameritech
Bell Atlantic Corporation
BellSouth Corporation
NYNEX Corporation
Pacific Telesis Group
Southwestern Bell Corporation
U S WEST, Inc.
American Telephone & Telegraph Co.
ADAPSO, The Computer Software and Services Industry Association, Inc.
ALC Communications Corporation*
Alarm Industry Communications Committee*
Association of North American Directory Publishers
Commerce Clearing House, Inc.
CompuServe Incorporated*
Consumer Federation of America
Cox Enterprises, Inc.
Dialog Information Services, Inc.
The Dun & Bradstreet Corporation*
G.E. Communications & Services
Information Industry Association
International Communications Association
Leghorn Telepublishing Company*
LO-AD Communications of California, Inc.
LO-AD Communications of Nevada, Inc.
McGraw-Hill, Inc.
MCI Communications Corporation
Mead Data Central, Inc.
National Association of Broadcasters

* Parties below who have indicated they have no further interest in the outcome of the petition.

National Cable Television Association, Inc.
The Newspaper Association of America
Prodigy Services Company
Toward Utility Rate Normalization
West Publishing Company
The Wisconsin Citizens' Utility Board, Inc.

Pursuant to Rule 29.1 of the Rules of this Court, petitioners state as follows:

Association of Directory Publishers (formerly the Association of North American Directory Publishers) is the largest national association of independent publishers of telephone directories. Its members publish traditional print yellow pages directories and some of them also publish electronic enhancements to and versions of these directories. ADP has no parent company or non-wholly owned subsidiary.

Commerce Clearing House, Inc. publishes a wide variety of materials, provides on-line publishing products, and engages in distributive publishing services. CCH has no parent company or non-wholly owned subsidiary.

Consumer Federation of America is a non-profit coalition of over 240 pro-consumer organizations with 50 million individual members. Since 1968, it has represented the consumer interest before federal and state policymaking and regulatory bodies. CFA has no publicly held subsidiaries or affiliates.

Cox Enterprises, Inc. is a privately-held corporation engaged in a variety of telecommunications businesses, including mass media. Cox has no parent company. Cox's non-wholly owned subsidiaries and affiliates are:

Cox Cable Cleveland Area, Inc.
Cox Cable Quad Cities, Inc.
Cox Cable Saginaw, Inc.
Cox Cable Spokane, Inc.
Gold Book, Inc.
Manheim Investments, Inc.
Manheim Services Corporation

Manheim Auto Resale Services, Inc.
Bay Cities Auto Auction
Los Angeles Dealer Auto Auction
Southern California Auto Auction
Denver Auto Auction
Greater Tampa Bay Auto Auction
St. Pete Auto Auction
Georgia Dealers Auto Auction
Greater Chicago Auto Auction
Minneapolis Auto Auction
St. Louis Auto Auction
Newburg Auto Auction
Ohio Auto Auction
Portland Auto Auction
Clanton's Auto Auction
Fort Worth Auto Auctions
San Antonio Auto Auction
Texas Hobby Auto Auction
Harrisonburg Auto Auction
South Seattle Auto Auction
Utah Auto Auction
Manheim Metro Detroit Auto Auction
Manheim Auctions Government Services, Inc.
Arizona Auction Services, Inc.
Southwest Auto Auction
Arizona Auto Auction
Imperial Auto Auction
Daytona Auto Dealers Exchange
Florida Auto Auction of Orlando, Inc.
Lakeland Auto Auction
California Auto Dealers Exchange, Inc.
Riverside Auto Auction
Colorado Auction Services Corporation
Dealers Auto Auction of Dallas
Fredericksburg Auto Auction, Inc.
Fresno Auto Dealers Auctions, Inc.
Bishop Brothers Auto Auction
Georgia Auction Services, Inc.
Community Auction Resale, Services

Kansas City Auto Auction, Inc.
Missouri Auction Services Corporation
National Auto Dealers Exchange, Inc.
Manheim Finance Canada Inc.
New England Auto Auction, Inc.
Toronto Auto Auction
New Manheim Auto Auctions Limited
Manheim Auto Auctions Limited (Canada)
Manheim's Oshawa Dealers Exchange
New York Auto Auction Services, Inc.
North Carolina Services Corporation
Manheim Auto Auction
Pennsylvania Auction Services Business Trust
Texas Auto Auction Services, Inc.
Butler Auto Auction
Wisconsin Services Corporation
Las Vegas Auto Auction, Inc.

Dialog Information Services, Inc. is a provider of electronic information retrieval services from a wide variety of databases, covering such fields as science, business, and finance. Dialog's parent is Knight-Ridder, Inc., and its only non-wholly owned subsidiary is Article Express International.

GE Information Services (formerly known as G.E. Communications & Services), a division of General Electrict Company, provides a wide variety of electronic information services. GE Information Services has no publicly held subsidiaries or affiliates.

Information Industry Association is a trade association representing companies involved in the generation, distribution, transmission, and use of information. IIA has no parent company or non-wholly owned subsidiary.

The Information Technology Association of America (formerly known as ADAPSO, The Computer Software and Services Industry Association, Inc.), is the principal trade association of the computer software and services industry. ITAA has no parent company or non-wholly owned subsidiary.

International Communications Association is a not-for-profit business league of corporate, educational, and governmental users of telecommunications equipment, facilities, and services whose members collectively spend at least $23 billion per year on purchases of these products and services. ICA has no parent company or non-wholly owned subsidiary.

McGraw-Hill, Inc. is a provider of electronic publishing services and a variety of other information service offerings and products. McGraw-Hill's only publicly-owned affiliate is McGraw-Hill, Ryerson, Ltd., of Canada.

MCI Communications Corporation is a publicly held corporation engaged in a wide variety of telecommunications businesses, including but not limited to national and international voice and data telecommunications services and information services. MCI directly or indirectly owns interests in General Communications, Inc.; Infonet Services Corporation; Clear Communications Corporation; and AAP Telecommunications Pty. Ltd.

Mead Data Central, Inc. provides on-line legal, news, and business information services. Mead Data Central is a subsidiary of Mead Corporation. Mead Data Central has two wholly owned subsidiaries, Folio Corporation (a Utah corporation), and Mead Data Central International, Inc. (a Delaware corporation).

National Association of Broadcasters is a non-profit, incorporated association of radio and television broadcast stations and networks which serves and represents America's radio and television stations and all the major networks. NAB has no parent company or non-wholly owned subsidiary.

National Cable Television Association, Inc., a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the country's more than 50 million cable

television subscribers. NCTA has no publicly held subsidiaries or affiliates.

The Newspaper Association of America (formerly the American Newspaper Publishers Association) is a nonprofit corporation serving more than 1,250 member newspapers. The majority are daily newspapers accounting for more than 80 percent of the circulation in the United States. Membership also includes many non-daily U.S. newspapers and other newspapers published in the Western Hemisphere, Europe and the Pacific. Several hundred individuals and companies allied with the newspaper industry are associate members of NAA. NAA has no parent company or non-wholly owned subsidiary.

Prodigy Services Company is a general partnership of International Business Machines Corporation and Sears, Roebuck & Co. Prodigy provides a two-way, interactive on-line information and transaction service designed for consumers in their homes. Prodigy has no parent company or non-wholly owned subsidiary.

Toward Utility Rate Normalization is a tax-exempt organization that is the only statewide consumer organization in California which represents consumers in regulatory, legislative, and judicial proceedings. TURN has no parent company or non-wholly owned subsidiary.

West Publishing Company is a provider of American legal materials including online services, case reports, digests, statutes, encyclopedias, treatises, dictionaries, educational texts and reference materials, and CD-ROM products and law school texts.

The Wisconsin Citizens' Utility Board, Inc. is a nonprofit voluntary membership organization of Wisconsin residential, farmer, and small business utility consumers. CUB has no parent company or non-wholly owned subsidiary.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| RULE 14 AND RULE 29 STATEMENTS | ii |
| TABLE OF AUTHORITIES | xi |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| A. The Decree | 3 |
| B. Proceedings to Modify the Line-of-Business Restrictions | 4 |
| C. The Initial Decision of the Court of Appeals | 5 |
| D. Remand Proceedings Before the District Court | 6 |
| E. The Decision of the District Court on Remand | 8 |
| F. The Second Decision of the Court of Appeals | 9 |
| REASONS FOR GRANTING THE WRIT | 10 |
| I. THE D.C. CIRCUIT RULE VIOLATES THE TUNNEY ACT BY PROHIBITING COURTS FROM MAKING INDEPENDENT JUDICIAL FINDINGS WHEN DECIDING WHETHER TO ENTER CONSENT DECREE PROPOSALS | 12 |
| II. THERE IS A SQUARE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE SECOND CIRCUIT REGARDING THE DEFERENCE OWED TO THE DEPARTMENT OF JUSTICE IN JUDICIAL PROCEEDINGS TO ENTER OR MODIFY ANTITRUST CONSENT DECREES | 18 |

TABLE OF CONTENTS—Continued

Page

III. THE D.C. CIRCUIT'S REFUSAL TO REVIEW THE PROPOSED MODIFICATION UNDER THE EXPLICIT STANDARD DRAFTED BY THE DISTRICT COURT AND CONSISTENTLY USED BY THE PARTIES IS INCONSISTENT WITH A PRIOR DECISION OF THIS COURT, WITH DECISIONS IN OTHER CIRCUITS, AND WITH SOUND ADMINISTRATION OF CONSENT DECREES ..... 22

CONCLUSION ..... 27

APPENDIX A ..... 1a

APPENDIX B ..... 24a

APPENDIX C ..... 76a

APPENDIX D ..... 126a

APPENDIX E ..... 127a

## TABLE OF AUTHORITIES

*Cases* Page

*Alexander v. National Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982) ..... 17
*American Newspaper Publishers Ass'n v. United States*, 112 S. Ct. 366 (1991) ..... 9
*AMF, Inc. v. Jewett*, 711 F.2d 1096 (1st Cir. 1983) ..... 26
*Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980) ..... 21
*Associated Indus. v. Department of Labor*, 487 F.2d 342 (2d Cir. 1973) ..... 19
*Association of Data Processing v. Board of Governors*, 745 F.2d 677 (D.C. Cir. 1984) ..... 19
*Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) ..... 26
*Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947) ..... 14
*Central States Enters. v. ICC*, 780 F.2d 664 (7th Cir. 1985) ..... 19
*Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966) ..... 14
*EEOC v. Pan American World Airways*, 622 F. Supp. 633 (N.D. Cal. 1985), *app. dism.*, 796 F.2d 314 (9th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987) ..... 21
*Ferrell v. Pierce*, 743 F.2d 454 (7th Cir. 1984) ..... 26
*In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 784 F.2d 831 (7th Cir. 1986) ..... 26
*In re Chicago, Rock Island & Pac. R.R. Co.*, 865 F.2d 807 (7th Cir. 1988) ..... 26
*In re Fine Paper Antitrust Litigation*, 695 F.2d 494 (3d Cir. 1982) ..... 26
*In re Penn Central Transp. Co.*, 486 F.2d 519 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974) ..... 26
*Kasper v. Board of Election Comm'rs*, 814 F.2d 332 (7th Cir. 1987) ..... 21
*Keith v. Volpe*, 784 F.2d 1457 (9th Cir. 1986) ..... 26
*Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982) ..... 17

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) | 21 |
| *Maryland v. United States*, 460 U.S. 1001 (1983) | 4, 17 |
| *NAACP v. FPC*, 425 U.S. 662 (1976) | 21 |
| *NLRB v. Nevada Consol. Copper Corp.*, 316 U.S. 105 (1942) | 15 |
| *Pope v. United States*, 323 U.S. 1 (1944) | 21 |
| *Roadway Express v. NLRB*, 647 F.2d 415 (4th Cir. 1981) | 19 |
| *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) | 19, 21 |
| *South v. Rowe*, 759 F.2d 610 (7th Cir. 1985) | 26 |
| *Thomas v. County Office Comm.*, 327 F. Supp. 1244 (S.D. Tex. 1971) | 15 |
| *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984) | 11, 18-21 |
| *United States v. Associated Milk Producers*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) | 20 |
| *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959) | 23, 25, 26 |
| *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) | 3, 4, 5, 16, 18 |
| *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) | 17 |
| *United States v. BNS, Inc.*, 858 F.2d 456 (9th Cir. 1988) | 17 |
| *United States v. Board of Educ.*, 717 F.2d 378 (7th Cir. 1983) | 26 |
| *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1985) | 21 |
| *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) | 17 |
| *United States v. Hooker Chems.*, 540 F. Supp. 1067 (W.D.N.Y. 1982) | 21 |
| *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) | 21 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States v. Jas. H. Matthews & Co.*, 1989-1 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989) | 20 |
| *United States v. National Finance Adjusters*, 1985-2 Trade Cas. (CCH) ¶ 66,856 (E.D. Mich. 1985) | 20 |
| *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990) | 16 |
| *United States v. Seymour Recycling Co.*, 554 F. Supp. 1334 (S.D. Ind. 1982) | 21 |
| *United States v. Swift & Co.*, 286 U.S. 106 (1932) | 21 |
| *United States v. Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir. 1993) | *passim* |
| *United States v. Western Elec. Co.*, 1992 U.S. App. LEXIS 33009 (D.C. Cir. Nov. 5, 1992) | 9 |
| *United States v. Western Elec. Co.*, 969 F.2d 1231 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993) | 9 |
| *United States v. Western Elec. Co.*, 1991 U.S. App. LEXIS 33013 (D.C. Cir. Dec. 4, 1991) | 9 |
| *United States v. Western Elec. Co.*, 907 F.2d 1205 (D.C. Cir. 1990) | 9 |
| *United States v. Western Elec. Co.*, 1991-2 Trade Cas. (CCH) ¶ 69,610 (D.C. Cir. Oct. 7, 1991) | 9 |
| *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993) | 7, 8-9, 14, 16 |
| *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990) | *passim* |
| *United States v. Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990) | 5 |
| *United States v. Western Elec. Co.*, 592 F. Supp. 846 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985) | 24 |
| *United States v. Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 (N.D. Ohio 1989) | 20 |
| *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) | 15 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Vaughns v. Board of Educ.*, 758 F.2d 983 (4th Cir. 1985) | 26 |
| *Statutes* | |
| 5 U.S.C. § 554 | 15 |
| 5 U.S.C. § 556 | 15 |
| 5 U.S.C. § 706(2)(E) | 15 |
| 15 U.S.C. § 16(b)-(h) | *passim* |
| 15 U.S.C. § 16(e) | *passim* |
| 15 U.S.C. § 16(f) | 13 |
| 15 U.S.C. § 717f | 15 |
| 28 U.S.C. § 1254(1) | 2 |
| 28 U.S.C. § 2342(1) | 15 |
| 47 U.S.C. § 201 | 15 |
| 47 U.S.C. § 309(a) | 15 |
| 47 U.S.C. § 402 | 15 |
| 49 U.S.C. § 10922(c) | 15 |
| *Legislative Materials* | |
| H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 6535 | 16 |
| S. Rep. No. 298, 93d Cong., 1st Sess. 5 (1973) | 16 |
| 119 Cong. Rec. 24,597 (1973) | 16 |
| *The Antitrust Procedures and Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 2 (1973) | 11, 16 |
| Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess. 55 (1959) | 3 |
| *Other Authorities* | |
| Antitrust Division Manual, Consent Decree Standard Provisions, IV-76 (1987) | 11 |
| Axinn & Stoll, *U.S. v. American Cyanamid—Consent Decree Modification Standards*, 190 N.Y. L.J. 93 (1983) | 19 |

TABLE OF AUTHORITIES—Continued

Page

EPA Model Consent Decree, 56 Fed. Reg. 30996 (July 8, 1991) ..... 21

Note, *Construction and Modification of Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 Colum. L. Rev. 296 (1977) ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

---

No. ——

---

CONSUMER FEDERATION OF AMERICA, MCI COMMUNICATIONS CORPORATION, NEWSPAPER ASSOCIATION OF AMERICA, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ASSOCIATION OF DIRECTORY PUBLISHERS, COMMERCE CLEARING HOUSE, INC., COX ENTERPRISES, INC., DIALOG INFORMATION SERVICES, INC., GE INFORMATION SERVICES, INFORMATON INDUSTRY ASSOCIATION, INTERNATIONAL COMMUNICATIONS ASSOCIATION, MCGRAW-HILL, INC., MEAD DATA CENTRAL, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL CABLE TELEVISION ASSOCIATION, INC., PRODIGY SERVICES COMPANY, TOWARD UTILITY RATE NORMALIZATION, WEST PUBLISHING COMPANY, THE WISCONSIN CITIZENS' UTILITY BOARD, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA, AMERITECH, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORPORATION, U S WEST, INC., *et al.*,

*Respondents.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 993 F.2d 1572 (1993), and is reprinted at pages 1a-23a of the Appendix to this Petition ("App."). The opinion of the United States District Court for the District of Columbia is reported at 767 F. Supp. 308 (1991), and is reprinted at App. 24a-75a. The district court's decision was on remand from an opinion of the D.C. Circuit reported at 900 F.2d 283 (1990) (App. 76a-125a).

## JURISDICTION

The judgment of the court of appeals was entered on May 28, 1993. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The relevant portions of the Tunney Act, 15 U.S.C. §§ 16(e) and (f), are reprinted at App. 127a.

## STATEMENT OF THE CASE

### *Introduction*

This case involves a novel decision that strips district courts of their authority to make the decisive factual determinations governing the entry or modification of consent decrees, and transfers that authority, and hence effective control over judicial orders, to the Executive acting as prosecutor. The decision will radically affect the telecommunications industry. More broadly, it will alter the administration of consent decrees in virtually every area of the law.

The decision below holds that under the Tunney Act [1] and common law, a district court is not permitted to make an independent judicial determination of the competitive impact of a proposed modification to an antitrust consent

---

[1] 15 U.S.C. § 16(b)-(h); App. 127a.

decree. The D.C. Circuit held that in deciding whether to approve an uncontested decree modification, district courts are "bound to accept" the views of the Department of Justice regarding the competitive impact of the proposal so long as the Department's views are reasonable and have substantial factual support. It therefore approved a decree modification that the district court with record support had found to be anticompetitive. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576, 1578, 1581-82 (D.C. Cir. 1993); App. 10a, 15a, 21a, 23a. Thus, the ruling below squarely presents the question whether district courts should make independent judicial determinations on the factual question of the competitive impact of a consent decree proposal, or whether they should merely review the reasonableness of the Department's proposal.

### *Summary of Prior Proceedings*

**A. The Decree.** The Bell System long dominated the provision of telephone services and equipment in the United States. This nationwide vertically-integrated enterprise was based on local telephone monopolies that controlled access to consumers. In 1974, the United States brought a civil action alleging that the Bell System was continuing to use its bottleneck monopoly power to stifle competition.[2] In 1982, near the end of a lengthy trial, the government and AT&T proposed a settlement substantially granting the relief sought in the complaint, in-

[2] *United States v. AT&T*, 552 F. Supp. 131, 139 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The United States had instituted a civil action in 1949 to divest AT&T of subsidiaries that manufactured telecommunications equipment. In 1956, the Department agreed to what a congressional committee later termed "a token settlement" of that action involving no divestiture. Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess. 55 (1959).

cluding divestiture of the System's local telephone companies (known as Bell Operating Companies or "BOCs").[3] At the request of the Department, the decree prohibited the BOCs from entering "lines of business" where they would be able to abuse their bottleneck power over local phone lines—long-distance service, "information services," and manufacturing of telecommunications equipment. 552 F. Supp. at 227-28.

The district court reviewed the 1982 proposal under the Tunney Act, 15 U.S.C. § 16(b)-(h), which requires that "[b]efore entering any consent judgment proposed by the United States under . . . [the antitrust laws], the court shall determine that the entry of such judgment is in the public interest."[4] The district court found that the proposed decree, styled as a modification of an earlier consent decree,[5] would be procompetitive and therefore in the public interest. It specifically agreed with the position then espoused by the Justice Department that the information services restriction was "necessary" to prevent anticompetitive abuses and to permit effective competition in information services markets.[6] This Court summarily affirmed the district court's decision. *Maryland v. United States*, 460 U.S. 1001 (1983).

**B. Proceedings to Modify the Line-of-Business Restrictions.** Five years later, the BOCs, now supported by the

---

[3] 552 F. Supp. at 140-43. As a formal matter, the settlement was implemented as a "modification" of the 1956 consent decree. Hence, the order ultimately entered by the district court was termed a "Modification of Final Judgment," sometimes referred to as the "MFJ." 552 F. Supp. at 141 n.31.

[4] 15 U.S.C. § 16(e); App. 127a. The district court decided to apply Tunney Act procedures and standards to what was, in form, a "modification" of an earlier decree. 552 F. Supp. at 145.

[5] *See* n.3, *supra*.

[6] 552 F. Supp. at 189; Brief for Appellee United States of America, at 19-20, No. 91-5263 (D.C. Cir. filed Oct. 5, 1992).

Department because of a reversal of its prior position, petitioned for removal of the information services restriction. Numerous intervenors opposed removal. After an extensive proceeding, the district court found that the petitioning BOCs had failed to satisfy their burden under the terms of the decree to show there was "no substantial possibility" that the BOCs could use their monopoly power to impede competition in the information services market. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 565 (D.D.C. 1987).[7]

**C. The Initial Decision of the Court of Appeals.** On appeal, the D.C. Circuit vacated and remanded, concluding that the district court erred in analyzing the petitions under the "no substantial possibility" standard built into the decree. The D.C. Circuit concluded that the district court should have applied a different standard of review because none of the original parties to the decree had opposed the petitions. *United States v. Western Elec. Co.*, 900 F.2d 283, 305-07, 309 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 283 (1990); App. 113a-117a, 121a.

The court of appeals directed the district court on remand to review the petitions under a general "public interest" standard derived from the Tunney Act and the common law.[8] The court ruled that such a standard was

[7] Section VIII(C) of the decree permits removal or modification of the line-of-business restrictions only upon "a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231. The court did modify the information services restriction to permit BOCs to offer "information service gateways" and certain other information services, and it vacated the decree's restriction against "non-natural monopoly" services. 673 F. Supp. at 597, 599.

[8] *See* 900 F.2d at 295 (modification should be approved under Section VII "so long as [it] satisf[ies] the 'public interest' standard embodied in the Tunney Act"); App. 91a; 900 F.2d at 305, 306 (describing the "public interest" test as the "common law" test); App. 114a, 115a.

inherent in the decree's "Retention of Jurisdiction" clause (Section VII of the decree), and should derive its meaning from the antitrust laws. 900 F.2d at 291 n.6, 294-95, 306; App. 82a-83a, 90a-91a, 114a, 119a. Thus, a proposed modification would not be in the public interest if it would be anticompetitive. 900 F.2d at 308; App. 121a.

The court of appeals remanded to enable the district court to make "*de novo*" findings of fact under this public interest test. 900 F.2d at 308-09; App. 120a-121a. On remand, the court was to determine "whether removal of the information-services restriction as applied to the generation of information would be anticompetitive under *present* market conditions." 900 F.2d at 309; App. 121a. The court of appeals also observed that "the appropriate question under section VII is whether the proposed modification would be *certain* to lessen competiton in the relevant market." 900 F.2d at 308 (emphasis added; citation omitted); App. 119a.

Numerous intervenors filed a petition for certiorari.[9] The government and the BOCs opposed the petition, arguing, *inter alia*, that because the case had been remanded, the petition was premature.[10] The petition was denied. 111 S. Ct. 283 (1990).

**D. Remand Proceedings Before the District Court.** The BOCs again petitioned to remove the information services restriction and submitted evidence in support of their petition. A broad range of intervenors opposed elimination of the restriction.[11] They submitted evidence

[9] Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *MCI Communications Corp. v. United States* (No. 90-9, June 28, 1990).

[10] *See* n.38, *infra*.

[11] These included the Consumer Federation of America, Wisconsin Citizens' Utility Board, Toward Utility Rate Normalization, the New York State Department of Public Service, and the Public Service Commission of the District of Columbia. These groups

from "very distinguished economists," 993 F.2d at 1578, 1581, 1582; App. 15a, 21a, 23a, and technical witnesses, as well as documentary evidence, to demonstrate that the proposed modification would be anticompetitive and therefore contrary to the public interest.[12] The Department submitted no new evidence.[13] The Department and the BOCs argued that the D.C. Circuit's opinion required the district court to accept the Department's conclusion that the proposed modification would be procompetitive unless the court was "certain" the modification would lessen competition.[14]

---

had formal intervenor status. *E.g., United States v. Western Elec. Co.* (D.D.C. Sept. 28, 1990).

[12] The evidence demonstrated that, as regulated monopolists, BOCs had opportunities and incentives to injure competition in information services markets through discriminatory conduct that limited the range of services competitors could offer or raised competitors' costs for those services; that BOCs have the ability and incentive (through cost-shifting) to engage in strategic predation that would limit consumer choice; and that these strategies would succeed even against large firm competitors. *E.g.*, Declaration of Robert E. Hall, at 2-4, 28-30, 36-37 (D.C. Cir. J.A. 2153-55, 2179-81, 2187-88); Affidavit of Roger G. Noll, ¶¶ 29-33 (D.C. Cir. J.A. 2591-93); Affidavit of Carl Shapiro, ¶¶ 37, 41-45, 53-54, 66 (D.C. Cir. J.A. 2662-64, 2668, 2670); Affidavit of Robert A. Mercer, ¶¶ 12-22 (D.C. Cir. J.A. 2530-36); Affidavit of John E. Kwoka, Jr., ¶¶ 44-49 (D.C. Cir. J.A. 2452-53).

[13] *See* 767 F. Supp. at 313; App. 32a.

[14] BOC Mem. at 3, 4 (filed D.D.C. Aug. 17, 1990); BOC Reply at 11 (filed Jan. 15, 1991); DOJ Reply at 7 (filed Jan. 18, 1991) (court of appeals' opinion contained a "clear articulation of a certainty standard"). The BOCs argued that "no amount of discovery or trial testimony would permit the [district c]ourt to upset [the Department's] reasoned evaluation of the competitive risks and benefits of [BOC] entry." BOC Reply at 86-87. Nevertheless, the BOCs submitted extensive reply affidavits. On the subsequent appeal, the D.C. Circuit relied almost exclusively on those untested reply affidavits to support its conclusion that the Department's previously formed views concerning the competitive impact of removing the restriction were supportable by substantial evidence. *See* 993 F.2d at 1578-81; App. 15a-21a.

**E. The Decision of the District Court on Remand.** After weighing the competing evidence and hearing argument, the district court found that because BOCs control the local telephone access essential to connect information service providers to their customers, they have the ability "to exercise market power with respect to information services markets, that is, to raise price, to restrict output, or both." *United States v. Western Elec. Co.*, 767 F. Supp. 308, 315 (D.D.C. 1991); App. 35a-37a. The court also found that neither federal nor state regulation can be expected to prevent anticompetitive activities by the BOCs. 767 F. Supp. at 318-22; App. 42a-52a. Because of the limited effectiveness of regulatory oversight of their telephone rates, the BOCs could engage in strategic predation, shifting costs to subsidize their competitive information services with monopoly service revenues. 767 F. Supp. at 324-25; App. 56a-58a. Moreover, the court found that in the few information services markets BOCs were permitted to enter since divestiture, they had used their local exchange monopolies to engage in anticompetitive conduct. 767 F. Supp. at 322-24; App. 52a-55a.

In light of these findings, the district court concluded that "*the most probable consequence*[] of . . . entry by the [BOCs] into the sensitive information services market will be the elimination of competition from that market." 767 F. Supp. at 326 (emphasis added); App. 61a. Finding that "it would be difficult to conceive of a step that would be less in the public interest," 767 F. Supp. at 327; App. 62a, the district court nevertheless accepted the argument that the decision of the court of appeals left it "no choice" but to defer to the Department's current views. 767 F. Supp. at 330; App. 69a. Although the court found that entry of the BOCs into the information services market would be anticompetitive, the court could not be "certain" of these effects, as it believed the court of appeals required. The court therefore modified the

decree to remove the restriction. 767 F. Supp. at 331; App. 71a.[15]

**F. The Second Decision of the Court of Appeals.** Petitioners appealed, arguing that a "certainty" standard was unprecedented and incompatible with the Tunney Act. The D.C. Circuit agreed, but affirmed on a different ground. Although that court had stated in four decisions subsequent to its first decision that the question to be decided under Section VII of the decree was whether an uncontested modification would be "certain" to lessen competition,[16] and although the Department and the BOCs had cited its earlier opinion as establishing a "certainty" standard, the court of appeals dismissed the argument that it had imposed such a standard as a "straw man." 993 F.2d at 1576; App. 11a. The court acknowledged that a certainty standard "would extinguish Tunney Act review." *Id.*

Instead, the court of appeals formulated yet another standard. Having initially remanded for a "*de novo* assessment of the evidence" and "further factfinding" to determine whether removal of the information services restriction would be anticompetitive, 900 F.2d at 308, 309; App. 120a, 121a, it now held that the district court should simply have determined whether the Department's

---

[15] The district court stayed its decision pending appeal because of its doubts about applying a "certainty" standard. 767 F. Supp. at 332-33; App. 73a-75a. The D.C. Circuit vacated the stay. *United States v. Western Elec. Co.*, 1991-2 Trade Cas. (CCH) ¶ 69,610 (D.C. Cir. Oct. 7, 1991). Petitioners applied to this Court for a stay, which was denied. *American Newspaper Publishers Ass'n v. United States*, 112 S. Ct. 366 (1991).

[16] *United States v. Western Elec. Co.*, 1992 U.S. App. LEXIS 33009 (D.C. Cir. Nov. 5, 1992); *United States v. Western Elec. Co.*, 969 F.2d 1231, 1232, 1235 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993); *United States v. Western Elec. Co.*, 1991 U.S. App. LEXIS 33013 (D.C. Cir. Dec. 4, 1991); *United States v. Western Elec. Co.*, 907 F.2d 1205, 1210 (D.C. Cir. 1990).

views were "reasonable" and had "substantial factual support." 993 F.2d at 1578, 1581; App. 15a, 21a. The court characterized the district court's role in reviewing consensual modifications as "secondary," "limited," and "deferential." 993 F.2d at 1577, 1578; App. 12a, 15a.

The court did not remand for application of this new test. Instead, assuming a role it described as akin to that of a court reviewing agency action under the Administrative Procedure Act, the court of appeals decided that remand was unnecessary because it could itself determine that the Department's views regarding competitive impact were not unreasonable and were therefore binding on the district court. 993 F.2d at 1578, 1581-82; App. 14a, 21a-23a.

The court of appeals acknowledged that "the distinguished experts" who concluded that the modification would be anticompetitive might be "right," 993 F.2d at 1582; App. 23a, but ruled that the district court should not have made an independent judicial determination regarding competitive impact: "It is not, however, for us [*i.e.*, courts] to choose among the opposing positions of distinguished economists. The issue is whether the Department of Justice's position had substantial factual support and was grounded in reasonable analysis." 993 F.2d at 1581; App. 21a.

## REASONS FOR GRANTING THE WRIT

The D.C. Circuit has established an erroneous and broadly applicable standard for entry and modification of consent decrees. The standard dangerously cedes to the Department of Justice, acting in its prosecutorial capacity, effective control over judicial orders by commanding judicial acceptance of any "reasonable" view the Department adopts on critical factual issues such as the likely impact on competition of a proposed decree. That standard squarely violates the Tunney Act, which requires

independent judicial determination of such factual questions. *See* Point I. It also squarely conflicts with the Second Circuit's decision in *United States v. American Cyanamid Co.*[17] *See* Point II.

The decision below will have vast practical importance. It subjects one of the nation's most vital industries to a market structure found to be anticompetitive by the one court to have independently considered the evidence. Moreover, most of the antitrust cases brought by the Department result in consent decrees,[18] and nearly all of those decrees contain the standard "retention of jurisdiction" clause from which the D.C. Circuit's deferential standard is derived.[19] Thus, if unresolved, the conflict between the D.C. Circuit's rule, on the one hand, and the Tunney Act and Second Circuit authority, on the other, will have a major impact on the administration of the antitrust laws in many industries. Resolution of these questions is particularly important because the Tunney Act represents a deliberate choice by Congress regarding the proper allocation between the Judicial and Executive branches of the authority to determine the public interest. Few questions are more important or more worthy of review than those regarding the allocation of power between coordinate branches of government.

Moreover, the D.C. Circuit's new rule applies beyond the antitrust context. The court of appeals equated its "public interest" test with the common law test, 900 F.2d

---

[17] 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

[18] *The Antitrust Procedures and Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 2 (1973).

[19] Antitrust Division Manual, Consent Decree Standard Provisions, IV-76 (1987); App. 126a; 7 Trade Reg. Rep. (CCH) ¶¶ 50,701 to 50,747 (1993) (text of recent decrees).

at 305, 306; App. 114a, 115a, which courts apply to the entry and modification of consent decrees in such diverse areas as environmental and civil rights law. The D.C. Circuit's standard thus requires courts administering a broad range of consent decrees to enter, vacate, or modify their own orders whenever the Justice Department changes positions (from one "reasonable" view to a different or even opposite "reasonable" view), even when the change is based on *factual* assessments typically made by courts. *See* Point II.

Finally, the important questions presented above could have been avoided had the D.C. Circuit not erroneously substituted the more general "public interest" test for the specific standard for modification contained in the decree. Point III.

## I. THE D.C. CIRCUIT RULE VIOLATES THE TUNNEY ACT BY PROHIBITING COURTS FROM MAKING INDEPENDENT JUDICIAL FINDINGS WHEN DECIDING WHETHER TO ENTER CONSENT DECREE PROPOSALS.

The Tunney Act *forbids* a district court from entering a decree it finds will be anticompetitive: "Before entering any consent judgment proposed by the United States under this section, the *court* shall determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e) (emphasis added).[20] As the D.C. Circuit held,

[20] The decisions below applied the Tunney Act because the court and the parties assumed the Act applies to decree modifications as well as to the initial entry of decrees. 993 F.2d at 1576; 900 F.2d at 295; App. 10a, 91a. As the United States recognizes, "It is well established that when the government and antitrust defendants agree to modify or remove a restriction from a consent decree, the courts apply the common law 'public interest' standard, which also governs judicial review of proposed consent decrees under the [Tunney Act]." United States Opposition to Application of ANPA, et al., for a Stay Pending Appeal of the District Court's Information Services Ruling (S. Ct. filed Oct. 1991), at 9-10.

If the Tunney Act were not applicable to consent decree modifications that changed the substantive rights and obligations of the

and all parties acknowledge, in the antitrust context "in the public interest" means procompetitive. 900 F.2d at 309; App. 121a. Thus, the Tunney Act requires the court to determine whether a consent decree proposal is procompetitive. The Act deals expressly with the court's consideration of the Department's views. In mandating the court's determination whether a proposal will be procompetitive, the Act makes consideration of the Department's views discretionary. The court "may" consider testimony of government officials, authorize participation by government agencies, and consider the response of the United States to public comments—but it is not required to do so. 15 U.S.C. § 16(f).

The D.C. Circuit has reversed this statutory command by *requiring* entry of decrees endorsed by the Department if the Department's views are "reasonable" and have "substantial factual support." 993 F.2d at 1577-78, 1581; App. 12a-14a, 21a; *see also* 993 F.2d at 1577 ("the interesting question is not why courts should allow modification, but why they should consider upsetting it"); App. 13a. Under this standard, the Department's views must not only be considered, but are likely to be *controlling*. The consequence of this inversion of Congress' command is that in cases where there is substantial factual support on both sides, entry of a proposal supported by the Department is required *even if, as here, the district court*

---

parties, parties could avoid the judicial scrutiny required by the Act by agreeing to dissolve or modify substantive provisions of the decree shortly after court approval. *See* Note, *Construction and Modification of Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 Colum. L. Rev. 296, 312-13 (1977) ("provisions for public scrutiny of consent decrees would plainly be thwarted were the parties able to accomplish by modification what they would be unwilling to disclose in the original decree"). In any event, the court of appeals explicitly applied and construed the Tunney Act standard, and therefore its decision will control consideration of original consent decrees as well as consensual modifications.

*determines that the proposal would be anticompetitive.*[21] Thus, the ruling below directs district courts to ignore the clear commands of the Tunney Act. That ruling was outcome determinative.[22]

The court of appeals made no effort to reconcile its standard with the text and manifest purpose of the Tunney Act. Instead, the court relied on an inapt and largely unexplained analogy to principles of administrative law that require affirmance of certain agency "final action" if there is "substantial evidence" supporting the agency's decision—even if the court, acting independently, would have reached a different result. 993 F.2d at 1577-78; App. 12a-14a; 993 F.2d at 1581; App. 21a ("It is not, however, for us to choose among the opposing positions of distinguished economists."). Thus, if the government's views were "reasonable," but wrong, the D.C. Circuit rule would require district courts to approve the proposal.[23]

---

[21] 993 F.2d at 1576; App. 10a ("[I]t was not up to the [district] court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest.").

[22] The district court had independently found that allowing the modification would eliminate competition and therefore would be contrary to the public interest. 767 F. Supp. at 315-27; App. 35a-62a. The court of appeals did not rule that those findings were clearly erroneous. It simply held that the district court should not have made independent findings and that there was substantial factual support for the Department's position. 993 F.2d at 1581-82; App. 21a-23a. Indeed, the court recognized that "[t]he distinguished experts marshalled by the appellants may . . . be 'right.'" 993 F.2d at 1582; App. 23a.

[23] Under the substantial evidence test, an agency's judgment supported by substantial evidence is conclusive even if it is "factually questionable" and even if the opposite conclusion is *more* reasonable. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 477-78 (1947). Indeed, the purpose of the substantial evidence test is to "free[] the reviewing courts of the time-consuming and difficult task of weighing the evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-21 (1966); *NLRB v. Nevada*

Had Congress intended to require judicial approval of a proposed decree or modification whenever there was substantial factual support for the Department's position, it could easily have said so. Congress has vast experience creating standards and procedures for judicial review of agency decisionmaking. When Congress intends to give independent legal force to an agency's findings, and to require deferential review of those findings, it does so explicitly.[24] But Congress has not delegated *agency powers* to the Department under the antitrust laws. As the court of appeals recognized in its first decision, the Department functions as a prosecutor and does not make decisions with "independent legal significance." 900 F.2d at 297; App. 96a. Congress did not establish the Department's litigating position as "final agency action" with independent legal significance, did not impose substantial evidence review, and did not provide any of the safeguards and procedures for establishing an agency "record" to review.[25]

---

*Consol. Copper Corp.*, 316 U.S. 105, 106-07 (1942) (same). Thus, "[i]t is a basic maxim of federal administrative law that a court reviewing an agency's determinations cannot engage in independent fact finding." *Thomas v. County Office Comm.*, 327 F. Supp. 1244, 1256 (S.D. Tex. 1971) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)). None of these formulations of the substantial evidence test can be squared with the Tunney Act's requirement that a decree cannot be entered unless the court determines, after receiving all evidence it deems appropriate, that the government is *right* that the decree will be in the public interest.

[24] *E.g.*, 28 U.S.C. § 2342(1); 47 U.S.C. § 402; 5 U.S.C. § 706(2)(E). Similarly, when Congress intends to vest an agency with authority to determine the "public interest," it does so explicitly. *See, e.g.*, 47 U.S.C. § 309(a) (FCC must determine whether "public interest, convenience, and necessity will be served"); 47 U.S.C. § 201 (FCC must make public interest determination); 49 U.S.C. § 10922(c) (ICC makes public interest determination); 15 U.S.C. § 717f (FERC must decide whether action is "necessary or desirable in the public interest").

[25] *Compare* 5 U.S.C. §§ 554, 556, 706(2)(E) (safeguards and procedures for formal adjudication subject to substantial evidence

The legislative history confirms what the text of the Tunney Act makes clear: Congress did not intend to establish deferential APA-type review. Congress sought through the Tunney Act to end judicial "rubber stamping" by requiring courts to make "independent determination[s]" regarding the public interest.[26] It did so out of suspicion that the Department had bowed to industry pressures and had accepted ineffective decrees—specifically citing as an example the 1956 Bell System decree.[27] The decision below reverses the congressional requirement of independent judicial factfinding by explicitly relegating courts to the "secondary" and "limited" role of determining only whether the Department acted reasonably. 993 F.2d at 1577, 1578, 1581-82; App. 12a, 15a, 21a-23a.

---

review). Thus, in *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 434 (1st Cir. 1990), the court recognized that where Congress mandates a "public interest" standard but makes no provision for "final agency action" or deferential review, the "public interest" test "impl[ies] *court-selected*, not agency-selected standards." As here, the statutory provision at issue in *Ottati* "nowhere uses the words 'arbitrary,' or 'capricious' or any other word implying court *review* of an agency decision, the context in which those *reviewing* standards typically govern." *Id.*

[26] *E.g.*, S. Rep. No. 298, 93d Cong., 1st Sess. 5 (1973); H.R. Rep. No. 93-1463, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6535, 6538; *The Antitrust Procedures and Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 3 (1973); 119 Cong. Rec. 24,597-98 (1973) (Act requires "independent judgment" by courts) (statement of Sen. Tunney).

[27] *See* n.2, *supra; see also* 552 F. Supp. at 136-38, 149 & n.75 (citations omitted); H.R. Rep. No. 93-1463, at 3, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6535, 6537. This underlying congressional concern applies with particular force here because Department officials adopted "precisely . . . [the] opposite" position from that of their predecessors regarding the competitive impact of BOC provision of information services. *See* 767 F. Supp. at 330 n.115; App. 69a. The court of appeals recognized in its first opinion that the district court's skepticism of the Department's change of views was justified. 900 F.2d at 298.

The Court of Appeals, citing language in other lower court decisions, observed that a proposed decree need only be within "the reaches" of the public interest. 993 F.2d at 1576; App. 10a. But that phrase, which appears nowhere in the Tunney Act, cannot support the deferential standard adopted by the D.C. Circuit to govern the central *factual* question whether a decree proposal would be anticompetitive. The phrase merely expresses the concept that more than one decree approach may be procompetitive and thus within the reaches of the public interest. The district court here did not reject a proposal it thought would be procompetitive in favor of a more procompetitive proposal. Instead, it found the proposal would be anticompetitive. The Tunney Act requires courts to determine whether decree proposals will be procompetitive and thus within the public interest. The court of appeals' ruling requires courts to ignore that clear congressional command.[28]

---

[28] Because the "public interest" inquiry as applied to an antitrust decree proposal involves a factual inquiry into the effect of the proposal on competition, this case does not implicate the concerns of Chief Justice Rehnquist in dissenting from summary affirmance in *Maryland v. United States*, 460 U.S. 1001, 1004 (1983), that the "public interest" is too ill-defined for judicial resolution. The determination of *competitive impact* is a question of fact routinely determined by courts in antitrust litigation. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (Thomas, J.); *United States v. BNS, Inc.*, 858 F.2d 456, 463-64 (9th Cir. 1988); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1192 (8th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270-71 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Although in original decrees (as opposed to modifications) it might be appropriate to afford deference to the Executive on questions such as the risk of proceeding to trial if a case is not settled, the Court should clarify for lower courts that it would be inappropriate to require similar deference to the Executive on the threshold *factual* question of whether an antitrust decree or modification will be procompetitive.

## II. THERE IS A SQUARE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE SECOND CIRCUIT REGARDING THE DEFERENCE OWED TO THE DEPARTMENT OF JUSTICE IN JUDICIAL PROCEEDINGS TO ENTER OR MODIFY ANTITRUST CONSENT DECREES.

The Second Circuit and the D.C. Circuit sharply disagree regarding the extent to which courts must defer to Justice Department views regarding the competitive impact of proposed antitrust consent decrees or decree modifications. In *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), the Second Circuit reversed a district court decision that gave "great weight" to the Department's views, and directed the district court on remand to make its own "findings of fact." 719 F.2d at 567. The decision below, by contrast, required the district court to give *conclusive* weight to the Department's views so long as there was substantial evidence to support them. 993 F.2d at 1578, 1581; App. 14a-15a; 21a.

The conflict between *Cyanamid* and the decision below is striking. Both involved an intervenor's appeal of an order granting a motion to terminate provisions of an antitrust consent decree. Like the decree at issue here, the decree in *Cyanamid* was intended to "nullify any tendency which [the defendant] . . . would have to lessen competition." 719 F.2d at 565; 552 F. Supp. at 186-91. In both *Cyanamid* and this case the district court applied a "public interest" test that derived its meaning from the antitrust laws. *See* pages 6-8 above; 719 F.2d at 565. Finally, in both cases the district court took evidence and heard the views of intervenors, but ultimately deferred to the Department's views. See pages 6-8 above; 719 F.2d at 567 (district court gave "great weight" to the Department's views and determined that the Department had not "abused its discretion").

The similarity ends there. The Second Circuit rejected the deferential "abuse of discretion" standard the district

court had applied, reversed the district court's decision to defer to the Department's views, and remanded for independent findings of fact by the district court. 719 F.2d at 566-67.

The deferential "substantial evidence" test that the D.C. Circuit adopted is indistinguishable from the "abuse of discretion" test that the Second Circuit rejected in *Cyanamid*.[29] Indeed, in its brief to this Court in *Cyanamid*, the United States listed as one of the questions presented whether the Second Circuit erred in *not* deferring to the "reasoned judgment of the United States that termination of the decree would be in the public interest as defined by the antitrust laws."[30] The standard the United States unsuccessfully urged in *Cyanamid* is precisely the standard adopted by the D.C. Circuit here.

Although the Court has thought it important to clarify the standard for reviewing *contested* consent decree proposals,[31] it has never addressed the standard for reviewing

---

[29] In the context of judicial review of an agency's factual findings, courts interpret the arbitrary-and-capricious/abuse-of-discretion standard as the equivalent of a substantial-evidence standard. *See Association of Data Processing v. Board of Governors*, 745 F.2d 677, 683-85 (D.C. Cir. 1984) (Scalia, J.) (distinction between two standards is "largely semantic"); *Central States Enters. v. ICC*, 780 F.2d 664, 674 n.10 (7th Cir. 1985) (same); *Associated Indus. v. Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (same); *Roadway Express v. NLRB*, 647 F.2d 415, 424 & n.17 (4th Cir. 1981) (substantial evidence standard yields same result as abuse-of-discretion standard).

[30] Brief for the United States on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *American Cyanamid Co. v. Melamine Chemicals, Inc.*, No. 83-1085 (Jan. 25, 1984), at (I). *See also* Axinn & Stoll, *U.S. v. American Cyanamid—Consent Decree Modification Standards*, 190 N.Y.L.J. 93 (1983) 1, col. 1, at 30, col. 3 ("After *American Cyanamid*, this determination [whether to approve a consented termination of a decree] must be made by the court *independent of government assertions and assurances*") (emphasis added).

[31] *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992).

uncontested proposals. There is substantial confusion among lower courts as to their proper role, and the role of the Executive, in determining under the common law and the Tunney Act whether an uncontested decree proposal is consistent with the public interest. Thus, for example, in analyzing an uncontested proposal to terminate an antitrust consent decree, the court in *United States v. Jas. H. Matthews & Co.*, 1989-1 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989), made detailed, independent findings of fact as to the likely effect on competition of terminating the decree. Following the Second Circuit's decision in *Cyanamid*, the *Matthews* court refused to apply a highly deferential standard that would inquire only into the government's good faith. 1989-1 Trade Cas. at 60,434. Instead, the court held that while a "degree of deference" is due the Department, ultimately it is the court that must decide whether termination would be anticompetitive and therefore inconsistent with the public interest. *Id.* In contrast, in *United States v. National Finance Adjusters*, 1985-2 Trade Cas. (CCH) ¶ 66,856 (E.D. Mich. 1985), the court applied an "abuse of discretion" standard and approved an uncontested modification on the ground that the Department's views had "some support in economic theory and in the facts of this case." 1985-2 Trade Cas. at 64,248.[32]

Moreover, resolution of this widespread confusion will have far-reaching effects beyond the antitrust arena, because the D.C. Circuit equates the Tunney Act "public interest" test with the test applied at common law.[33] Un-

---

[32] *See also United States v. Associated Milk Producers*, 534 F.2d 113, 118 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) (denial of intervention upheld because government acted in good faith and "adequately protect[ed] the public interest" in accepting consent decree). Still other courts claim to defer to the Department, but nonetheless undertake an independent review of the public interest. *E.g.*, *United States v. Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 at 61,795 (N.D. Ohio 1989).

[33] *See* 900 F.2d at 306 (uncontested motions are to be governed by "common law principles pursuant to section VII"); App. 115a.

der traditional common law principles, courts have inherent power to refuse to enter decrees or modifications they find contrary to the public interest,[34] because entry or modification of a consent decree is not a mere recording of a private agreement, but a judicial act resulting in an order with the force of law.[35]

The common law public interest test is applied to decrees in diverse areas, including civil rights and environmental law, where courts routinely make independent factual determinations as to the need for and effectiveness of proposed decrees.[36] Indeed, the standard "retention of jurisdiction" clause from which the D.C. Circuit's public interest test is purportedly derived is also found in the "model consent decree" the EPA has used in hundreds of cases.[37]

---

[34] *See, e.g., United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932); *Cyanamid*, 719 F.2d at 565; *see also* U.S. Brief as Amicus Curiae, at 10, in *Rufo v. Inmates of Suffolk County Jail*, Nos. 90-954 & 90-1004 (S. Ct., filed April 15, 1991) ("[A] federal court is more than 'a recorder of contracts' from whom parties can purchase injunctions") (citing *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986)). The "public interest" inquiry is not open-ended, but "take[s] meaning from the purposes of the regulatory legislation" at issue. *NAACP v. FPC*, 425 U.S. 662, 669 (1976), *cited in Cyanamid*, 719 F.2d at 565.

[35] *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992); *Local Number 93 v. Cleveland*, 478 U.S. 501, 519 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975); *Pope v. United States*, 323 U.S. 1, 12 (1944); *United States v. Swift & Co.*, 286 U.S. 106, 114-17 (1932).

[36] *See, e.g., Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 338-39 (7th Cir. 1987); *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 400 (W.D. Mo. 1985); *EEOC v. Pan American World Airways*, 622 F. Supp. 633 (N.D. Cal. 1985), *app. dism.*, 796 F.2d 314 (9th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987); *United States v. Seymour Recycling Co.*, 554 F. Supp. 1334, 1337-38 (S.D. Ind. 1982); *United States v. Hooker Chems.*, 540 F. Supp. 1067, 1072-79 (W.D.N.Y. 1982).

[37] *See* 56 Fed. Reg. 30996, 31011 (July 8, 1991).

The Court should therefore clarify for lower courts whether deference is owed the Executive on the factual questions that determine whether an uncontested decree or modification is consistent with the underlying substantive laws—in an antitrust case, whether the proposal will be anticompetitive—even when there is more persuasive evidence contradicting the Executive's views. The Court should rule that deference to the Executive on those questions is not appropriate.

## III. THE D.C. CIRCUIT'S REFUSAL TO REVIEW THE PROPOSED MODIFICATION UNDER THE EXPLICIT STANDARD DRAFTED BY THE DISTRICT COURT AND CONSISTENTLY USED BY THE PARTIES IS INCONSISTENT WITH A PRIOR DECISION OF THIS COURT, WITH DECISIONS IN OTHER CIRCUITS, AND WITH SOUND ADMINISTRATION OF CONSENT DECREES.

The D.C. Circuit would not even have reached the issue of the common-law Tunney Act standard for decree modifications if it had not committed a threshold error. That error was to reject the specific "no substantial possibility" test for reviewing modification requests prescribed in Section VIII(C) of the decree, and to substitute the more general "public interest" test.[38] By substituting a more general test, the court of appeals ignored the decree's express language and undermined the intent of the parties and the district court.

---

[38] In 1990, petitioners unsuccessfully sought review in this Court of the question whether the explicit decree test or the public interest test applies here. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *MCI Communications Corp. v. United States* (No. 90-9, June 28, 1990). Respondents opposed that petition, arguing that petitioners prematurely sought review of an interlocutory decision remanding for further fact-finding. Brief for the United States in Opposition, at 13-14 (No. 90-9, Sept. 1990); Brief in Opposition of Respondent Regional Bell Operating Companies, at 19-22 (No. 90-9, Sept. 7, 1990). That decision is now final.

As the BOCs have recognized, applying the D.C. Circuit's version of the general public interest test rather than Section VIII(C) is "frequently dispositive."[39] The court of appeals acknowledged that "[w]hether section VII or section VIII(C) governs an uncontested motion to modify [the line-of-business restrictions] is not a mere academic question." 900 F.2d at 306; App. 114a. Under Section VIII(C), the court is required to resolve factual disputes by making independent findings of fact. Thus, in evaluating the competitive impact of proposals under Section VIII(C), the D.C. Circuit has not deferred to the Department's views or limited review to the existence of "substantial factual support." *See* 900 F.2d at 302-03 (rejecting Department's views that removal of the BOCs' restriction on manufacturing would be procompetitive); App. 106a-110a. In this case, the D.C. Circuit did not suggest, even in *dicta*, that the proposed modification would satisfy the Section VIII(C) test, which requires the BOCs to show there is "no substantial possibility" that their entry into the information services market "could" lessen competition in that market.

The D.C. Circuit's supplanting of the Section VIII(C) test is flatly inconsistent with this Court's ruling in *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959). There, the Court ruled that appellate courts should defer to district court interpretations of consent decrees where, as here, the language of the decree "in its normal meaning" supports the district court's interpretation, where that interpretation "has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start," and where "the trial court concludes that this interpretation is in fact the one the parties intended." 360 U.S. at 23-24. Each of those factors is present here. Indeed,

---

[39] Petition for a Writ of Certiorari, *Ameritech Corp. v. AT&T*, No. 92-848 (Nov. 16, 1992), at 15.

there are even stronger reasons for deferring to the district court interpretation here than in *Atlantic Refining*, because here the district court itself insisted upon and drafted the provision at issue.

*First*, the "normal meaning" of Section VIII(C)'s language supports the district court's application of that section to both contested and uncontested petitions. Section VIII(C)'s plain language extends to *any* petition to remove a line-of-business restriction. To reach a contrary result, the court of appeals seized on Section VIII(C)'s requirement of a "showing by a petitioning BOC," asserting that this language "appears to contemplate adversarial testing." 900 F.2d at 295, 306; App. 90a, 115a. However, both uncontested and contested modifications are triggered by petitions. The more natural reading of Section VIII(C), therefore, is that it applies to all modification petitions, whether or not contested by other parties or intervenors. Because all such petitions seek judicial relief, all require a "showing" that the requested relief would be in the public interest. Nothing in the language of Section VIII(C) suggests that the consent or opposition of any party has bearing on the applicability of the section's "no substantial possibility" standard.

*Second*, the D.C. Circuit ignored six years of history that flatly contradicted its strained distinction between contested and uncontested petitions. The petitions at issue here were originally filed by the BOCs and by the Department *under Section VIII(C)*. Indeed, in the years following entry of the decree, the BOCs filed well over 100 petitions to modify, remove or waive the decree's line-of-business restrictions under Section VIII(C).[40] The

---

[40] In 1984, the district court ruled that *all* BOC requests for removal under Section VIII(C) should first be reviewed by the Department and then presented to the Court as a Department petition under Section VIII(C). *United States v. Western Elec. Co.*, 592 F. Supp. 846 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985).

overwhelming majority were *not* contested by original parties to the decree, and many were not contested by intervenors. Whether contested or not, these petitions were evaluated—without objection by the Department or the BOCs—under Section VIII(C).[41] The D.C. Circuit accorded no significance to this consistent practice, even though *Atlantic Refining* establishes that such a practice is powerful evidence of how a consent decree should be interpreted. 360 U.S. at 23-24.

*Third*, the D.C. Circuit cavalierly rejected the district court's conclusion that "in fact" Section VIII(C) was intended to govern *all* requests to remove line-of-business restrictions. 673 F. Supp. at 532-35. The D.C. Circuit erred in failing to treat the district court's conclusion about the intent of the parties as a factual finding, and compounded the error by expressly declining to give *any* deference to the district court's views, even though the district court drafted Section VIII(C), incorporated it as a condition of entry of the decree, and interpreted it repeatedly and consistently during administration of the decree. 900 F.2d at 294; App. 89a.

As the D.C. Circuit was forced to acknowledge, its refusal to give any deference to the findings of the district court was inconsistent with decisions in other circuits. 900 F.2d at 294; App. 89a. For example, one representative case, acknowledged in the decision below (900 F.2d at 294; App. 89a), recognized "the district

---

[41] In the proceeding at issue here, AT&T took no formal position on the petitions to remove the information services restriction, but stated that wholesale elimination of the restriction was not warranted. Transcript of district court hearing, July 1, 1987, at 315; AT&T's Comments on the Report and Recommendations of the United States, at 111 (filed March 13, 1987). The Department argued that the "no substantial possibility" test of Section VIII(C) had been met. It did not argue that Section VII or any other test should govern. Transcript of Oral Argument, at 25 (D.C. Cir. Dec. 6, 1989); *see generally id.* at 24-29.

court's extensive experience with the case and the decree" and therefore required "special deference to its conclusions about the meaning of the decree." *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (citation omitted).[42] Similarly, appellate courts routinely accord substantial deference to a district court's interpretation of its own orders,[43] and consent decrees are judicial orders.

The D.C. Circuit's indifference to the decree's plain language, the long-standing and consistent practice of the parties, and the trial court's finding as to the parties' intentions, is flatly inconsistent with this Court's decision in *Atlantic Refining* and with decisions in other circuits. The D.C. Circuit's ruling frustrates the policies of clarity and certainty that the inclusion of a provision like Section VIII(C) is designed to serve. Settlement of cases by consent decree will be sharply deterred if the parties cannot rely on the plain, intended, and settled meaning of decree provisions.

---

[42] *See also Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984) (district court's "views on interpretation [of a consent decree] are entitled to deference") (citation omitted); *United States v. Board of Educ.*, 717 F.2d 378, 382 (7th Cir. 1983); *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (deference to district court's interpretation is due when the meaning of a consent decree is "fairly open to debate"); *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) (district court's interpretation of a consent decree "deserve[s] deference" because "[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it."); *cf. South v. Rowe*, 759 F.2d 610, 613 n.4 (7th Cir. 1985).

[43] *See In re Chicago, Rock Island & Pac. R.R. Co.*, 865 F.2d 807, 810 (7th Cir. 1988); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 784 F.2d 831, 834-35 (7th Cir. 1986); *Vaughns v. Board of Educ.*, 758 F.2d 983, 989 (4th Cir. 1985); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 498 (3d Cir. 1982); *In re Penn Central Transp. Co.*, 486 F.2d 519, 531 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974).

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JOHN R. WORTHINGTON
Senior Vice President
and General Counsel
MCI COMMUNICATIONS CORP.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-1600

BRUCE J. ENNIS, JR.*
CHESTER T. KAMIN
MICHAEL H. SALSBURY
ANTHONY C. EPSTEIN
DONALD B. VERRILLI
JEROME L. EPSTEIN
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
*Counsel for MCI Communications Corporation*

* Counsel of Record

August 26, 1993

SUE D. BLUMENFELD
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-8000

*Counsel for Association of Directory Publishers*

GEORGE F. PAPPAS
BARBARA L. WAITE
VENABLE, BAETJER, HOWARD & CIVILETTI
Suite 1000
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

*Counsel for Commerce Clearing House, Inc.*

GENE KIMMELMAN
CONSUMER FEDERATION OF AMERICA
1424 16th Street, N.W.
Suite 604
Washington, D.C. 20036
(202) 387-6121

*Counsel for Consumer Federation of America*

WERNER K. HARTENBERGER
LAURA H. PHILLIPS
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street, N.W.
Washington, D.C. 20037
(202) 857-2500

*Counsel for Cox Enterprises, Inc.*

ROBERT P. REZNICK
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

*Counsel for Dialog Information Services, Inc.*

BRUCE E. HUNTER
GE INFORMATION SERVICES
401 N. Washington Street
Rockville, MD 20850-1785
(301) 340-5342

*Counsel for GE Information Services*

ROBERT J. BUTLER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 479-7000

ANGELA BURNETT
INFORMATION INDUSTRY ASSOCIATION
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 639-8262

*Counsel for Information Industry Association*

JOSEPH P. MARKOSKI
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

*Counsel for Information Technology Association of America*

BRIAN R. MOIR
Attorney-at-Law
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 331-9852

*Counsel for International Communications Association*

ANN J. LAFRANCE
DAVID ALAN NALL
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

*Counsel for McGraw-Hill, Inc.*

MICHAEL A. JACOBS
SARA STRAIGHT WOLF
GERALD E. YUNG
MEAD DATA CENTRAL, INC.
9393 Springboro Pike
P.O. Box 933
Dayton, Ohio 45401
(513) 865-7200

*Counsel for Mead Data Central, Inc.*

HENRY L. BAUMANN
BARRY D. UMANSKY
TERRY L. ETTER
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

*Counsel for National Association of Broadcasters*

H. BARTOW FARR III
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

DANIEL L. BRENNER
MICHAEL S. SCHOOLER
NATIONAL CABLE TELEVISION ASSOCIATION
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

*Counsel for National Cable Television Association, Inc.*

RICHARD E. WILEY
MICHAEL YOURSHAW
WILLIAM BAKER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

JOHN F. STURM
Senior Vice President
Government, Legal and Public Policy
NEWSPAPER ASSOCIATION OF AMERICA
529 14th Street, N.W.
Suite 440
Washington, D.C. 20045-1402
(202) 783-4697

*Counsel for Newspaper Association of America*

ROBERT J. BUTLER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

*Counsel for Prodigy Services Company*

VANCE K. OPPERMAN
OPPERMAN HEINS & PAQUIN
1301 K Street, N.W.
East Tower, Suite 650
Washington, D.C. 20005
(202) 789-3970

JONATHAN W. CUNEO
LAW OFFICES OF JONATHAN W. CUNEO
1301 K Street, N.W.
East Tower, Suite 650
Washington, D.C. 20005
(202) 789-3960

*Counsel for West Publishing Company*

KATHLEEN F. O'REILLY
510 E Street, S.E.
Washington, D.C. 20003
(202) 543-5068

*Counsel for Wisconsin Citizens' Utility Board, Inc.*
and
*Toward Utility Rate Normalization*